A

LIM TECK KONG

v.

DR ABDUL HAMID ABDUL RASHID & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: B-02-757-98]

C

28 SEPTEMBER 2005

TORT: *Negligence - Professional negligence - Engineers - Failure of engineer to do thorough testing of soil - Whether engineer owes duty to ensure whether safe to build on particular site*

D

TORT: *Damages - Negligence - Whether damages may be awarded for pure economic loss*

EVIDENCE: *Expert evidence - Court to assess weight of evidence - Whether more weight to be given to based on investigation carried out*

E *closer to time of incident taking place*

The plaintiffs had engaged the services of the 1st defendant, a firm of civil and structural engineers, to build a bungalow for the plaintiffs on Lot 3007. The 4th defendant was a partner of the

F 1st defendant's firm. At the recommendation of the 1st defendant, the plaintiffs entered into a written building contract with a contractor to build the bungalow. One of the terms and conditions of the building contract was that the contractor was to perform the works shown in the drawings and the specifications prepared

G by or under the direction of the 1st defendant. The bungalow was duly completed and the plaintiffs and their family moved into the said building on 11 April 1985. In or about the middle of 1987, the 3rd defendant commenced construction works on Lot 3008 which was a lot adjoining Lot 3007 to erect another residential

H building. Between the night of 17 September 1988 and the early morning of 18 September 1988, the rear portion of the plaintiffs' bungalow collapsed and as a result the bungalow became uninhabitable. The plaintiffs thus suffered losses, damages and expenses. The plaintiffs claimed that the damages to the bungalow

I and Lot 3007 were due to breach of duty by all the defendants either jointly or severally. The defendants claimed that they had fully discharged their legal and/or contractual duties by adopting

the normal engineering practices based on their experience in development of building sites and housing infrastructures. The learned High Court Judge found for the plaintiffs and ordered that the 1st, 3rd and 4th defendants pay the sum of RM364,173.

The learned judge found the 4th defendant liable on the ground that the 4th defendant, as an engineer, should have taken more serious considerations of the ground and its vicinity in designing and devising plans that would make a house erected on Lot 3007 safe for habitation. The 4th defendant failed to do a thorough test of the soil and ground on Lot 3007. The 4th defendant only did visionary and feeling tests which the learned judge found not acceptable. The 4th defendant was apportioned 60% liability on his failure to exercise his skill and duty as an engineer and consultant in constructing the bungalow. The 4th defendant appealed, raising 15 grounds which could be simplified into two broad issues, *ie*, contractual liability and causation. In the court below, two separate reports prepared by two experts were tendered as evidence. The first report prepared by one Dr. Ramli was tendered by the plaintiffs while the second report prepared by one Dr. Toh was tendered by the 4th defendant. The two reports were basically evidence in respect of causation of the collapse. The 4th defendant contended that the learned trial judge was in error when he preferred the evidence of Dr. Ramli. The 4th defendant's other ground of appeal was that the learned judge had erred in giving judgment on "pure economic loss" based on tortious liability.

Held (dismissing the appeal with costs)
Per Mokhtar Sidin JCA:

[1] The learned judge in his judgment explained why he preferred to accept the finding (opinion) of Dr. Ramli as against the finding of Dr. Toh. The learned trial judge had come to the right conclusion. Dr. Ramli carried out the investigation soon after the collapse when the instability of the ground could still be seen. Dr. Toh, on the other hand, carried out his investigation six years after the collapse when the ground had stabilized. The learned judge did consider the evidence of both but at the end preferred the evidence of Dr. Ramli on the ground that the investigation carried out by Dr. Ramli was closer to the time when the incident took place. Further, the evidence of Dr. Ramli was supported by the 4th defendant himself when he admitted that he did not do a thorough

testing of the soil where the bungalow was built. This was negligence on the part of the 4th defendant. (para 26, 27 & 29)

[2] The losses by the plaintiffs were not pure economic losses. The damages suffered by the plaintiffs were the loss of the bungalow which collapsed a few years after it was built on that site, where the 1st defendant failed to conduct thorough tests on the site about whether it was safe to build a building as designed by the 1st defendant on that site. It was the duty of the 1st defendant as consultants employed by the plaintiffs to ensure that it was safe to build the building on that site. The 1st defendant failed to carry a thorough test of the soil when they recommended the building to be built on the said land to the plaintiffs. The learned judge came to the correct conclusion that the 1st defendant was also negligent and liable. (para 35)

Obiter:

[1] The learned judge was within his rights to award damages on pure economic loss. It is time to move out of the shadow of the House of Lords' decisions of *Murphy* and *D & F Estates* and move along with other Commonwealth countries where damages could be awarded on pure economic loss. (para 34)

Bahasa Malaysia *translation of headnotes*

Plaintif telah mendapatkan perkhidmatan defendan pertama, sebuah firma kejuruteraan sivil dan struktur, untuk membina sebuah banglo untuk plaintif di Lot 3007. Defendan keempat adalah rakan kongsi firma defendan pertama. Atas cadangan defendan pertama, plaintif memeterai suatu kontrak binaan bertulis dengan seorang kontraktor bagi membina banglo tersebut. Salah satu terma kontrak binaan adalah bahawa kontraktor harus membina mengikut lakaran dan spesifikasi seperti yang disedia atau diarahkan oleh defendan pertama. Banglo telah disiapkan dan plaintif serta keluarga mula mendiami banglo tersebut pada 11 April 1985. Pada atau lebih kurang pertengahan tahun 1987, defendan ketiga memulakan kerja-kerja pembinaan di Lot 3008, yang bersebelahan Lot 3007, bagi mendirikan sebuah lagi bangunan kediaman. Di antara malam 17 September 1988 dan awal pagi 18 September 1988, bahagian belakang banglo plaintif runtuh dan akibatnya banglo tersebut tidak lagi boleh didiami. Plaintif dengan itu menanggung kehilangan, kerosakan dan kerugian. Plaintif mengatakan bahawa kerosakan pada banglo dan Lot 3007 adalah disebabkan defendan-defendan

melanggar kewajipan mereka, sama ada secara bersendirian atau bersesama. Defendan-defendan mengatakan bahawa mereka telah menunaikan tanggungjawab undang-undang dan/atau kontraktual mereka dengan melaksanakan amalan-amalan kejuruteraan biasa dan berdasarkan pengalaman mereka dalam membangun tapak pembinaan dan infrastruktur perumahan. Yang arif hakim Mahkamah Tinggi memutuskan untuk plaintif dan memerintahkan defendan-defendan pertama, ketiga dan keempat membayar sejumlah RM364,173.

Yang arif hakim mendapati defendan keempat bertanggungan atas alasan bahawa defendan keempat, sebagai seorang jurutera, dalam merekacipta pelan bagi mempastikan rumah di Lot 3007 selamat untuk didiami, harus memberi pertimbangan yang lebih serius kepada keadaan tanah dan kawasan sekitarnya. Defendan keempat gagal melakukan ujian tapak dan tanah yang rapi di Lot 3007. Defendan keempat hanya melakukan ujian penglihatan dan rasa, yang mana yang arif hakim mendapati sebagai tidak mencukupi. Atas kegagalannya melaksanakan kepakaran dan tanggungjawabnya sebagai seorang jurutera dan konsultan ketika membina banglo, defendan keempat telah dipertanggungkan dengan liabiliti 60%. Defendan keempat merayu dan membangkitkan 15 alasan yang terbahagi kepada dua isu penting, iaitu, liabiliti kontraktual dan penyebaban. Di mahkamah di bawah, dua laporan berasingan yang disediakan oleh dua orang pakar telah dikemukakan sebagai keterangan. Laporan pertama oleh seorang Dr. Ramli telah dikemukakan oleh plaintif, sementara laporan kedua oleh seorang Dr. Toh dikemukakan oleh defendan keempat. Kedua-dua laporan, pada asasnya, menyentuhi sebab musabab bagi keruntuhan. Defendan keempat berhujah bahawa yang arif hakim telah khilaf apabila ia berpihak kepada keterangan Dr. Ramli. Alasan rayuan defendan keempat yang lain adalah yang arif hakim khilaf kerana memberikan penghakiman "semata-mata atas kehilangan ekonomi" berdasarkan liabiliti tort.

Diputuskan (menolak rayuan dengan kos)
Oleh Mokhtar Sidin HMR:

[1] Yang arif hakim dalam penghakimannya menjelaskan kenapa beliau memilih untuk menerima rumusan (pendapat) Dr. Ramli dan tidak rumusan Dr. Toh. Yang arif hakim telah mencapai konklusi yang betul. Dr. Ramli menjalani penyiasatan tidak lama selepas keruntuhan di kala ketidakstabilan pada tanah masih

A boleh dilihat. Sebaliknya, Dr. Toh menjalankan siasatannya enam tahun selepas keruntuhan semasa tanah sudah pun stabil. Yang arif hakim telah mempertimbang kedua-dua laporan tetapi pada akhirnya memihak kepada keterangan Dr. Ramli atas alasan bahawa siasatan yang dijalankan oleh Dr. Ramli
B lebih dekat kepada masa insiden berlaku. Selain itu, keterangan Dr. Ramli disokong oleh defendan keempat sendiri apabila beliau mengakui bahawa beliau tidak membuat ujian tanah yang terperinci di tempat banglo didirikan. Ini adalah kecuaian di pihak defendan keempat.

C

[2] Kerugian plaintif bukan semata-mata kerugian ekonomi. Kerugian yang dialami oleh plaintif adalah kehilangan banglo yang runtuh selepas beberapa tahun ia didirikan di tapak tersebut di mana defendan pertama selaku konsultan gagal
D melakukan ujian tanah di situ, bagi menentukan bahawa adalah selamat untuk mendirikan bangunan seperti yang direkabentuk oleh defendan pertama. Menjadi kewajipan defendan pertama, selaku konsultan yang diupah plaintif, untuk mempastikan bahawa adalah selamat untuk mendirikan bangunan di tapak
E tersebut. Defendan pertama gagal menjalankan ujian tanah yang terperinci apabila mereka menganjurkan kepada plaintif untuk mendirikan bangunan di situ. Yang arif hakim telah mencapai konklusi yang tepat bahawa defendan adalah juga cuai dan bertanggungan.

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Obiter:

[1] Yang arif hakim berhak untuk mengaward gantirugi semata-mata atas kerugian ekonomi. Masanya sudah sampai untuk kita keluar dari bayang-bayang keputusan-keputusan House of
G Lords di dalam *Murphy* dan *D & F Estates* dan berjalan seiring dengan Negara-negara Komanwel lain di mana gantirugi boleh dibenarkan semata-semata atas kerugian ekonomi.

Case(s) referred to:

H *D & F Estates Ltd & Ors v. Church Commissioners for England & Ors [1989] AC 177* ***(refd)***

Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors [1999] 8 CLJ 131 ***(refd)***

Kerajaan Malaysia v. Cheah Fong Chiew & Anor [1993] 2 MLJ 439 ***(refd)***

Murphy v. Brentwood District Council [1990] 2 All ER 908 ***(refd)***

I *Teh Khim On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 AMR 1558* ***(refd)***

For the appellant - Stanley KW Chang (Ti Lian Bee with him); M/s Stanley Chang & Partners
For the respondents - N Pathmanathan (Preetha Pillai with her); M/s Skrine & Co

[Appeal from High Court, Shah Alam; Civil Suit No: 22-9-1990]

Reported by Amutha Suppayah

JUDGMENT

Mokhtar Sidin JCA:

[1] Sometime in January 1990, the respondents issued a writ of summons and a statement of claim against the appellant and four others. This writ and statement of claim was amended on 27 December 1990. In the amended writ and the statement of claim the 1st defendant was Jurusan Malaysia Consultants (sued as a firm), the 2nd defendant was Majlis Daerah Gombak, the 3rd defendant was Mighty Corporation Sdn Bhd, the 4th defendant is the appellant in the present appeal and the 5th defendant was an individual by the name of Leow Kim Sang. After hearing the case, the High Court, Shah Alam on 15 December 1996 made an order that the 1st, 3rd and 4th defendants do pay the sum of RM364,173 to be apportioned as follows:

(1) The 1st defendant and/or 4th defendant to pay the plaintiffs (the respondents in this appeal) the sum of RM218,503.80 representing 60% liability.

(2) The 3rd defendant the sum of RM145,669.20 representing 40% liability.

[2] The claim of the respondents as against the 2nd defendant was dismissed with costs. As against the 5th defendant, the learned judge found that he was a clerk in the 1st defendant's firm, although he represented himself as a partner in the 1st defendant's firm. No order was made against him.

[3] In order to understand the roles played by the parties, we have to refer to the statement of claim and the statements of defence. We will refer to the parties as they were in the High Court. In their amended statement of claim, the plaintiffs claimed that sometime in early 1984, they wanted to build a double-storey bungalow (hereinafter referred to as "the bungalow") on Lot No.

A 3007, Mukim of Ulu Kelang, Gombak, Selangor, belonging to them and the bungalow was intended to be their residential home. The plaintiffs then engaged the services of the 1st defendant, a firm of civil and structural engineers who was then practicing at 201-A (1st floor), Jalan Imbi, Kuala Lumpur. The plaintiffs claimed that B when they went to the office of the 1st defendant, the 4th and 5th defendants claimed to be the partners of the 1st defendant's firm. During the trial it was established that the 5th defendant was only a clerk and a draughtsman of the firm and not a partner. At the recommendation of the 1st defendant, the plaintiffs entered C into a written agreement (the building contract) with one Yap Foot Ching (hereinafter referred to as "the contractor") to build the bungalow. One of the terms and conditions of the building contract was the contractor was to perform the works shown in the drawings and the specifications prepared by or under the D direction of the 1st defendant. It is not disputed that the bungalow was duly completed and the plaintiffs and their family moved into the said building when the contractor handed over vacant possession to the plaintiffs on 11 April 1985.

E **[4]** The claim of the plaintiffs against the 2nd defendant (a corporate body established under the Local Government Act 1976) was that the 2nd defendant being the District Council where the bungalow was situated has legal duties which amongst others include:

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(a) to do or cause to be taken or done such steps or acts so as to prevent matters which are likely to endanger public safety or cause damage to property within the local authority area including and not limited to the proper supervision and G examination of proper and safe drainage and flow of water within the area and the removal of any dangers arising therefrom;

(b) the supervision and approval of, *inter alia*, building plans in respect of buildings and other structures proposed to be built H or erected within local authority area.

[5] In or about the middle of 1987, the 3rd defendant commenced construction works on Lot 3008 which was a lot adjoining Lot 3007 to erect another residential building. During I the course of construction on Lot 3008 a meeting was held between the owner of Lot 3008, a representative of the 3rd defendant and the 1st plaintiff whereby the 3rd defendant was

alerted that construction works carried out by the 3rd defendant on Lot 3008 posed a potential danger to the neighbouring lots including Lot 3007 because Lot 3008 stood on higher ground. The 3rd defendant's representative assured the parties that adequate steps would be taken to prevent obstruction and water collection and ensure free flow and drainage of water passing through the vicinity of Lot 3007.

[6] Between the night of 17 September 1988 and the early morning of 18 September 1988, the rear portion of the bungalow collapsed and as a result the bungalow became uninhabitable. The plaintiffs thus suffered losses, damages and expenses. In the statement of claim the plaintiffs claimed that the damages to the bungalow and Lot 3007 were due to breach of duty by all the defendants either jointly or severally. The damages and losses suffered by the plaintiffs are particularised in the schedules to the statement of claim.

[7] The 1st, 4th and 5th defendants filed their statement of defence. In the statement of defence the 4th and 5th defendants admitted they were the partners of the 1st defendant's firm. (During the trial evidence was adduced to show that the 5th defendant was not a partner but only a clerk in the firm). They denied that they were in breach of duty and put the plaintiffs to strict proof. The defendants further claimed that they had fully discharged their legal and/or contractual duties by adopting the normal engineering practices. They also claimed that in constructing the bungalow they had adopted the following measures:

(a) conducted pre-design assessment and evaluation of the site conditions of Lot 3007;

(b) supported the new buildings on Lot 3007 on a piled foundation based on correct design considerations.

[8] This was based on their experience in development of building site and housing infrastructure. The defendants averred that the cause of the collapse was due to the failure to maintain by an ignorant owner of an initially stable slope which was increased by overburden to the slope and erosion.

[9] The 2nd defendant in their statement of defence denied that they own any legal duty as averred by the plaintiffs in their re-amended statement of claim. The 2nd defendant further stated in

their defence that pursuant to the Local Government Act, the 2nd defendant merely had the power to execute works of such general advantage to the inhabitants of the local authority areas and to do all things necessary or conducive to the public safety, health and convenience. The 2nd defendant also stated that they were not responsible for any alleged loss, damage or expense incurred or suffered by the plaintiffs.

[10] The 3rd defendant admitted that they did construction works on Lot 3008, but denied that the construction works caused the damages and losses on Lot 3007 as claimed by the plaintiffs. The 3rd defendant also denied that a meeting between the representative of the 3rd defendant, the 1st plaintiff and the owner of Lot 3008 ever took place as alleged by the plaintiffs. The 3rd defendant claimed that they had carried out and completed the construction of the building on Lot 3008 in accordance with the contract drawings and specifications and also the directions of the architects and civil and structural engineers employed by the owner of Lot 3008. The 3rd defendant further averred that they had taken all reasonable measures and steps at all material times to avoid dangers and/or causing any damage to the neighbouring lots such as implementing run-off drains and that there were no unfilled trench on Lot 3008 during and after the construction of the building on Lot 3008. The 3rd defendant further claimed that the bungalow's collapse was caused and/or contributed to by the plaintiffs' failure to exercise reasonable care in not engaging a competent consultant civil and structural engineers to prepare, design, drawings and plans and all other necessary works in connection with the building of their family house. Alternatively, the 3rd defendant contended that the collapse of the bungalow was caused by and/or contributed to by the breach of the 1st defendant.

[11] The learned trial judge in his judgment found the following facts as proved either by documents or oral evidence adduced during the trial. Sometime in 1984 or 1985, the 1st plaintiff went to the 1st defendant's office. When he was inside the office he was attended to by the 5th defendant who gave an impression that he was also an engineer. The plan for a double-storey house was drawn and signed by the 4th defendant. It was not disputed that the 4th defendant was a registered engineer with the Board of Engineers at the material time but he was struck off at the time when the trial took place as a result of his admission to the regulatory body that he had breached the rules by operating two

firms at the same time, one of which was the 1st defendant. That was the reason why the 5th defendant (who was only a clerk and a draughtsman) claimed to be an engineer and a partner in the 1st defendant's firm. The 1st defendant then prepared the building plans in respect of the bungalow and submitted the plans to the 2nd defendant for approval. The 2nd defendant approved the plans. The contractor approved by the 4th defendant then commenced construction of the bungalow and completed it in 1985 and handed over vacant possession of the bungalow to the plaintiffs.

[12] On 18 September 1988, at about 3am the plaintiffs were awakened by a loud noise. The 1st plaintiff looked out of his bedroom window and saw the concrete deck and the boundary brickwall which were erected on his land had tilted and collapsed. The plaintiffs and their family then rushed out of the house. At about 5am, the 1st plaintiff heard shattering sounds of glass coming out from his house. By about 6am the plaintiffs returned to the house and found that half of the house on the side of the river had collapsed. The incident was reported to the relevant authorities including the 2nd defendant. On the instigation of the 2nd defendant, the plaintiffs appointed Kumarasivam Tan Ariffin Sdn Bhd (KTA), an engineering consultant, to determine the cause of the collapse. A report was issued on 3 April 1989. In that report it was stated the causes of the collapse were:

(1) the slope on which the said building was built was steep with a gradient of about 45 degrees;

(2) engineers advising on the building and construction of the house took little consideration in assessing the stability of the slope;

(3) an excavation that was carried out on a neighbouring land known as Lot 3008 at the material time by the 3rd defendant who were the contractors engaged in erecting a double-storey bungalow thereon;

(4) heavy rainfall; and

(5) toe erosion at the river banks bordering Lot 3007.

[13] The learned trial judge found that the 4th defendant was the proprietor of the 1st defendant. The 5th defendant was only a clerk and a draughtsman working with the 1st defendant and not the co-proprietor as alleged by the plaintiffs. The learned trial

judge then dismissed the plaintiffs' claim against the 5th defendant. The learned judge found that the claim by the plaintiffs against the 2nd defendant is based on negligence and breach of statutory duties. The learned trial Judge found that the plaintiffs failed to establish the specific provisions in the statute where the 2nd defendant had breached except may be the following provisions:

(1) Section 101(ee) of the Local Government Act relates to "the local authority shall have the power to divert, straighten, define and canalise the course of any stream, channel or watercourse";

(2) Section 53(1) of Act 133 requires local authority to maintain and keep in repair watercourses under the control of the local authority;

(3) Section 70A of Act 133 empowers the local council to order cessation of earth works where the safety of life or property is affected or is likely to be affected;

(4) By-law 8(3) and 17 Uniform Building By-Laws 1984 confer powers on local authority to disapprove building and structural plans submitted for its approval;

(5) By-law 10 of the Uniform Building By-Laws 1984 sets out requirement for building plans submitted to the local authority must contain complete lines of surface water discharge to the proposed drains, which the plaintiffs claim is absent in the site plans for their lot submitted by the 1st and/or 4th defendants;

(6) By-law 25(2) of the Uniform Building By-Laws requires that "all … open spaces in and around buildings shall be suitably protected against soil erosion", of the 2nd defendants have failed to ensure relevant steps to protect this.

[14] The learned trial judge dismissed the claim against the 2nd defendant on the following grounds:

> Firstly, whether the pleadings of the plaintiffs have sufficiently disclose material facts to support the plaintiffs' claim for breach of statutory duty against the 2nd defendants. In order to succeed under a cause of action for breach of statutory duty the plaintiffs must show that they came within the class of person intended by an Act or regulation to be protected, that the statutory provision was broken, and that they suffered damage and that this damage was caused by the breach of the provision … In essence the entire claim based on breach of statutory duty depends on the provision of the statute or by-laws being alleged to be breached.

The affected legal provision has thus become a material fact that needs to be disclosed, for failure to do so the defendant will be caught by surprise and be prejudiced in their defence. ....

Secondly, the Uniform Building By-Law 1984 in which various provisions are said to have been breached did not come into force in the State of Selangor until 1.1.1986. The building plans of the house was submitted around 1984 and the completed house was handed over for possession to the plaintiffs on 11.4.1985. Therefore any allegations for breach of statutory duties which involve the 2nd defendants in respect of this piece of legislation before it came into force cannot be sustained, there being no enacted statute at the material time to be breached. Though the 2nd defendants may have relied on this by-law as a guideline in the course of their duties before the enactment of this statute in the State of Selangor, but in a claim for breach of statutory duty reliance must be on a lawful enactment and not on a piece of legislation that has no force of law in a particular area.

Thirdly, by virtue of section 95 of Act 133:

> The State Authority, local authority and any public officer or employee of the local authority shall not be subjected to any action, claim, liabilities of demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or plans thereof are subject to inspection and approval by the State Authority, or such public authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or material or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

[15] The plaintiffs did not appeal against that decision.

[16] As against the 3rd defendant, the plaintiffs' claim was for unnecessarily allowing infiltration or seepage of water into the ground and/or allowing it to overflow onto the plaintiffs' land causing saturation in the soil resulting in the landslide which brought down the bungalow. The learned judge was of the view that there are four main allegations of fault against the 3rd defendant:

A (a) inserting a pipe into the public drain fronting Lot 3009 which caused rainwater to overflow onto Lot 3009, Lot 3008 and Lot 3007;

(b) blocking the public drain fronting Lot 3008 with plastic sheets and wooden debris thereby causing rainwater to
B overflow onto Lot 3008 and Lot 3007;

(c) excavating a trench measuring 60' x 10' x 3' on Lot 3008, causing it to collect a concentration of rainwater which seeped and infiltrated into the ground;

C (d) leaving transverse drains built along the slope of Lot 3008 to end three quarter of the way down the slope instead to the river.

[17] In his judgment, the learned judge found that the plaintiffs
D failed to prove the first two allegations, but succeeded in proving the last two allegations. In his judgment he said:

> The cause of action against the 3rd defendants is based on nuisance, negligence and the rule of Rylands & Fletcher. As for liability in respect of water it is best stated in *Clerk & Lindsell on*
E *Tort* 13th Edition at page 851, of which was adopted by the Federal Court in *Seong Fatt Sawmill Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286. It reads as follows:
>
> > Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially
> F accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless the higher proprietor is liable if he deliberately drains his land onto his lower neighbour's land and this
> G appears to be so if the water is caused to flow in a more concentrated form than it naturally would, as the result of artificial alterations in the levels and contours of the higher land.
>
> When water appears upon the surface of the land in a diffused
> H state, with no regular course, and then disappears by percolation or evaporation, Justice Winderyer J in an Australian case of *Gartner v. Kidman* (1961-62) 108 CLR 12 has this to add;
>
> > The higher proprietor: He is not liable merely because surface water flows naturally from his land on to lower
> I land. He may be liable if such water is caused to flow in a more concentrated form than it naturally would. It flows in a more concentrated form than it naturally would if, by the

> discernible work of man the levels or conformations of land have been altered and as a result the flow of surface water is increased at any particular point. If a more concentrated flow occurs simply as the result of the "natural" use of his land by the higher proprietor, he is, generally speaking, not liable. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purpose for which the land is being used and the manner in which the flow of water was increased, as for example whether it is agricultural land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth. …
>
> In this case, the 3rd defendants had artificially accumulated the rainwater with the excavation which was an alteration to the nature of the land. They had also interfered with the rainwater by constructing transverse drains ending three quarter way down the slope of Lot 3008. All these had affected the natural flow of the water resulting in its concentrated and increased infiltration into the land thereby causing destructive effect to Lot 3007. By such deeds the 3rd defendants have breached their duty of care towards the plaintiffs in respect of negligence, caused nuisance to the plaintiffs, as well as being liable in part under the rule of Rylands and Fletcher.
>
> Though the 3rd defendants did claim contributory negligence from the plaintiffs, but from the evidence so tendered this Court finds no support for it. The plaintiffs have built a house according to plans advised, drawn and designed by the 1st and/or 4th defendants. They have even taken cautionary steps to place piles along their slopes and sand bags at the toe of both Lots 3008 and 3007. They had also advised the 3rd defendants to take precautionary measures in their construction on Lot 3008. These were positive actions which cannot be interpreted as having contributed to the 3rd defendants' negligence.

[18] Based on the above, the learned judge found that the 3rd defendant was 40% liable for causing nuisance and negligence which contributed to the collapse of the bungalow. Apparently, the 3rd defendant did not appeal against that decision nor did the plaintiffs.

[19] The appeal before us is only the appeal by the 4th defendant. Though there is no appeal by the 1st defendant. it is clear from the evidence that the 4th defendant was the sole proprietor and the alto ego of the 1st defendant and the decision against the 4th defendant (the appellant) is a decision against the

A 1st defendant. It appears that when this matter came up for hearing in the court below, the 4th defendant had been struck off from the Register for committing an offence of running two engineering firms at two different places. We are not sure whether the 1st defendant is still in existence when this matter came up
B for hearing before us in view of the fact that the 4th defendant, being the sole proprietor of the 1st defendant, had been struck off from the Register.

[20] In his judgment, the learned trial judge found that the 1st
C defendant was an engineering firm solely owned by the 4th defendant (the appellant). In his judgment, the learned judge made it clear that any reference to the 1st defendant would be reference to the 4th defendant. In his judgment the learned judge said:

> D The contractual relationship between the plaintiffs and the 1st defendants, which is basically the 4th defendant derives from a letter of appointment tendered as exhibit P12. In it, the 1st defendants agree "as your (the plaintiffs) consultant engineers to prepare the civil and structure drawings and calculations and to submit to the respective authorities". These drawings and
> E calculations, as the heading in exhibit P12 specifies are for the plaintiffs' house. Other than this brief declaration of obligation and another two short paragraphs which devotes to the amount of professional fees charged and the mode of its payment, no other terms are elaborated.
>
> F By the nature of the plaintiffs' claim on contractual liability, the contentions are as follows:
>
> (a) the 1st and/or 4th defendants failed to exercise reasonable care and skill in carrying out all aspects of the engagement having regard in particular to the primary objective of the
> G plaintiffs;
>
> (b) the 1st and/or 4th defendants failed to properly and adequately implement and examine Lot 3007, its soil condition and surroundings to ascertain the suitability of the slope for the proposed house to be built thereon.
>
> H As these contentions are not within any express and specific condition in the written contract, the only basis the plaintiffs can rely on to succeed is within the legal concept of they being implied terms.

I

The principle of implied terms to be read into any contract is well accepted in our Courts, and for it to be applicable certain conditions must be fulfilled. On these, Lord Simon in the Privy Council case of *B.P. Refinery (Western-port) Pty Ltd v. Shire of Hasting* [1978] 52 ALJR 20 had spelled them out as follows:

> In their (their Lordships) view, for a term to be implied, the following conditions must be satisfied; it must be reasonable and equitable; it must necessary to give business efficacy to the contract, so that no term will be implied if the is effective without it; it must be so obvious that 'it goes without saying', it must be capable of clear expression, it must not contradict any express term of the contract.

In the circumstances of this case, the contract between the plaintiffs and the 1st and/or 4th defendants is one of performance of services by professionals who have described themselves as "consulting Civil and Structural Engineers". Any persons declaring themselves to be such must reasonably and equitably be expected to take reasonable care and skill in the performance of their craft. If this be not the case, why then should a layman engage and pay a price for their services. This term of the expected reasonable care and skill is so obvious in the 1st and/or 4th defendants' appointment that this Court finds it to come within the ambit of "it goes without saying". Further, this term is clear in expression and contradicts no other terms in exhibit P12. For these, it qualifies to be accepted as an implied term of the contract between the plaintiffs and the 1st and/or 4th defendants.

[21] Perusing the memorandum of appeal, the 4th defendant accepted the above ruling by the learned judge. In his memorandum of appeal the 4th defendant raised 15 grounds which could be simplified into two broad issues, ie, the contractual liability and the causation.

[22] Before us, the learned counsel conceded that the learned judge was correct in his conclusion in respect of the contractual liability. The 4th defendant contended that the plaintiffs in their statement of claim failed to plead duty of care, particulars of negligence and causation in respect of the collapse. Anyway, the learned counsel for the 4th defendant submitted that the contractual liability could be narrowed to: (i) whether the duty of care had been breached; and (ii) the causation.

[23] The learned trial judge in his judgment stated:

A In respect of the soil, he took some samples from the exposed layer on the land in his hand, examined it visually, and concluded it to be a silty sand soil. To him this soil "has good drainage properties, it drains very fast".

B As regards to the house, piling was recommended and carried out just before the slope so that the structure of the house would "not place too much weight on the slope."

All these evidence of the 4th defendant, considered in the light of the expert opinions of KTA's report and that of Dr. Toh's reveal C fundamental weaknesses. Firstly, as admitted by this defendant himself under cross-examination, "I cannot ascertain the soil by simply looking at it". By just looking and feeling the soil he agrees that the sheer strength of the soil cannot be determined. Yet, it is an accepted fact by the two expert engineers and to a large extent by the 4th defendant himself, that the determination D of this sheer strength of the soil was one of the vital factors in deciding slope stability. Exhaustive tests were conducted by both Dr. Ramli and Dr. Toh in the laboratory on the nature and strength of the grain found on Lot 3007, but with this professional, the 4th defendant, his judgment depended on only visual and feel. Further, though silty sand soil has good drainage E properties but as the 4th defendant also admits, "water also enter (into such soil) very fast, and water do not drain out immediately. There would be a period when the water will be held in the soil". If this is his theory then suction in the soil will be saturated, effecting its stress effectiveness to be reduced to a point where F the total sheer strength resistance would fail resulting in a landslide. So essential is the need for an engineer to determine the soil condition to a high degree of certainty, particularly on a gradient such as Lot 3007, that a failure to do so must be accepted as a breach of implied term of his appointment to take reasonable care.

G

[24] The 4th defendant submitted that the learned judge was in error in coming to the conclusion that the 4th defendant did not do enough to ensure that the building that he built on Lot 3007 was safe. In his submission, the 4th defendant stated that H construction of the bungalow was completed in 1985 and handed over to the plaintiffs on 11 April 1985. It was only on 17 September 1988 that the bungalow collapsed. The 4th defendant submitted further that the house on Lot 3008 which was situated above Lot 3007 (the bungalow) was constructed later. It was also I submitted that the bungalow collapsed two weeks after the 3rd defendant (who was the contractor building the house on Lot 3008) did some excavation to construct a trench 60' x 10' x 5'.

This trench collected water which caused weakening to the wall and caused the bungalow to collapse. The 4th defendant claimed that stability of 1.53 was enough and that was an accepted engineering fact. The 4th defendant referred to exh. P20 (pp. 775-878 of the appeal record at pp. 775-784) the expert opinion submitted by the 4th defendant.

[25] As to causation, the learned counsel for the 4th defendant submitted that there was no finding on causation by the learned judge. In the court below, two separate reports prepared by two experts were tendered as evidence. The first report from the firm KTA prepared by Dr. Ramli was tendered by the plaintiffs while the second report prepared by Dr. Toh was tendered by the 4th defendant. The two reports are basically evidence in respect of causation of the collapse. In addition, both Dr. Ramli and Dr. Toh gave evidence in court in support of their reports. The 4th defendant contended that the learned trial judge was in error when he preferred the evidence of Dr. Ramli.

[26] The learned judge in his judgment explained why he preferred to accept the finding (opinion) of Dr. Ramli as against the finding of Dr. Toh:

> The 4th defendant through the vehicle of the 1st defendants had professed to be a consultant civil and structural engineer. His specialized craft was to advise and design structures adequate and safe for a particular purpose. Why then did the house collapse, and was it due to the 4th defendant failing to exercise his skill to the standard of a man professing similar professional craft? To examine this, one would have to refer to the reports by the experts. *One is prepared by KTA with Dr. Ramli's testimony in Court to elaborate on it. The other is a report prepared by Dr. Toh on the 27.4.1995 – exhibit D20 done almost 6 years after the collapse of the house, at the request of the 1st and/or 4th defendants.*
>
> *Basically, in KTA's report, the collapse of the house was attributed to slope failure caused by the lateral movement of the earth supporting the foundation of the house. This was due to infiltration of water, such as rainfall which increased saturation of the soil causing a rise in water table and a reduction in the soil suction. "This result in a decrease in the effective stress and therefore soil sheer strength, to a point where the total sheer resistence along the potential failure surface is insufficient to sustain equilibrium of the slope". In KTA's opinion, though "it is extremely difficult to predict the relationship between suction and rainfall intensity for a particular soil profile, a conservative analysis could be made by assuming sheer strength parameters for saturated soil. This,*

A *coupled with a reasonable assumption of piezometric heads within the slope, would give a conservative indication of the factor of safety against failure of the slope*. Such an analysis, based on sheer strength and other data as shown in Drg. RBM-FR-89-2, gives a safety of about 1, indicating that the slope was of doubtful stability.

B *Dr. Toh, though questioned the high water table grafted in KTA's report is basically in agreement with the theory of the movement of soil. The main difference between his own and that of KTA's is that he attributes the failure of the slope not so much on the high water table but more on the toe failure of the slope near to the river which substantially supported*
C *the original slope.*

Now lets examine what the 4th defendant said and did. According to him, "dealing with soil is like taking our daily meal". Firstly, he had a visual inspection. From this he said, "one will be able to determine whether there is a need to machine bore to
D obtain the subsoil. When boring is necessary, the extracted soil will be sent to the laboratory for test". For Lot 3007 however, no subsoil was extracted for laboratory examination. Instead, the 4th defendant just had a visual examination of the slope and came to a conclusion that the slope, being a cut slope as compared with a filled slope, extraction by machine bore to obtain the
E subsoil was not necessary. He also observed that the slope was well done with a safe gradient. Though he did notice the river at the bottom of Lot 3007, he felt that it was a distance away from where the house was to be erected. He also added that, "I did not worry about the river because there was drainage contribution
F by the original developer under usual state authority requirement and this is for the maintenance of the river by channeling it. I took it for granted that the government will channel it".

In respect of the soil, he took some samples from the exposed layer on the land in his hand, examined it visually, and concluded
G it to be a silty sand soil. To him this soil "has good drainage properties; it drains very fast".

As regards to the house, piling was recommended and carried out just before the slope so that the structure of the house would "not place too much weight on the slope".
H

All these evidence of the 4th defendant, considered in the light of the expert opinions of KTA's report and that of Dr. Toh's reveal fundamental weaknesses. Firstly, as admitted by this defendant himself under cross-examination, "I cannot ascertain the soil by
I simply looking at it". By just looking and feeling the soil he agrees that the sheer strength of the soil cannot be determined. Yet it is an accepted fact by the two expert engineers and to a large extent by the 4th defendant himself, that the determination

of this sheer strength of the soil was one of the vital factors in deciding slope stability. *Exhaustive tests were conducted by both Dr. Ramli and Dr. Toh in the laboratory on the nature and strength of the grain found on Lot 3007, but with this professional, the 4th defendant,* his judgment depended on only visual and feel. Further, though silty sand soil has good drainage properties but as the 4th defendant also admits, "water also enter (into such soil) very fast, and water do not drain out immediately. There would be a period when the water will be held in the soil". If this is his theory then suction in the soil will be saturated, effecting its stress effectiveness to be reduced to a point where the total sheer strength resistence would fail resulting in a landslide. *So essential is the need for an engineer to determine the soil condition to a high degree of certainty, particularly on a gradient such as Lot 3007, that a failure to do so must be accepted as a breach of implied term of his appointment to take reasonable care.*

The level of the existence of the water table on the said land before the landslide is a hotly debated issue between Dr. Ramli and Dr. Toh. Both their assumptions on where this water table was, is based on facts after the slope had failed. Nevertheless, despite this differences of opinion, both agree that it plays an important part in the determination of slope stability. If the water table is high, then the slope is more vulnerable. This is only elementary and yet, according to the 4th defendant, a qualified engineer he felt that, "at the time I (he) looked at the site and drew my plans, I (he) did not make an assumption of where the water table was". This certainly is a clear breach of professional duties.

The presence of the river cannot be ignored. Though it may provide scenic beauty to the owner of the land above but its potential of threat to the land was, but apparent. This, the Court had the opportunity of observing this during a visit to the site. The 4th defendant had also made similar observation and conclusion where, besides what he uttered earlier adds, "I cannot say the river pose absolutely no danger but I assumed that the general development would have taken into consideration the river". This assumption together with his belief that since the owner pays drainage contribution, the government will channel the river are mere presumptions, taken for granted by him, and not substantiated or investigated as a professional in this field would have done. As a qualified engineer on civil and structural matters, with a slope as steep as that found in Lot 3007 coupled with a river of swift flowing water, the 4th defendant should have taken serious and indepth consideration of its presence when recommending, planning and finally building a house above. Presumptions have no place in this trade particularly when structures to be erected thereon must be able to withstand and

A accommodate natural and existing forces. Though financial costs can overcome any slope instability in a situation such as this, but at the very least the same should be made known to the owner. In this case this was not even presented.

B Faced with a sharp gradient as that in Lot 3007, and a river at its bottom little care and attention seemed to have been concentrated on the slope which practically engulfed two thirds of land in Lot 3007. In the opinion of this Court, an engineer of such qualification and skill as the 4th defendant should have taken these matters into more serious consideration to design and devise C plans that would have made the house erected thereon safe for habitation. Instead, a casual attitude was adopted without much care and skill practiced. Such work is indeed a far cry from that expected of a professional in a similar field. *As KTA's report prepared also by a firm of consulting engineers has remarked at p. 10, "it is evident that no systematic attempt to assess the stability of the slope* D *based on established engineering techniques" were adopted. Again this seems to be the view of Dr. Toh, a qualified engineer by his first degree and the 1st and/or 4th defendants own witness when he opinioned that "The engineers should have taken a duty on all these factors, ie, water table level plus wetting area before building a house on such a terrain". Under these circumstances, this Court hereby finds the 1st and/or 4th* E *defendants liable to the plaintiffs for breach of contract.* (emphasis added)

[27] Perusing the two reports, it is clear to us that the learned trial judge had come to the right conclusion. We are of the view F that the learned judge took great pains to study the two reports. The learned judge found the views expressed by Dr. Ramli and Dr. Toh to be almost similar except for the collapse. In his evidence, Dr. Ramli stated that the cause was due to water saturation on Lot 3007 while Dr. Toh stated the cause was due G to the slope near the river. The reason given by the learned judge in preferring the view of Dr. Ramli was the fact that Dr. Ramli carried out the investigation soon after the collapse when the instability of the ground could still be seen. Dr. Toh, on the other hand, carried out his investigation six years after the collapse H which, in our view, the ground had stabilised and the water saturation on Lot 3008 caused by the trench might not be there anymore and whatever water on Lot 3007 could by then have been drained out. In our view, the learned judge is justified in taking up that view.

I

[28] In the passage we cited above (in particular the last paragraph), the learned judge found the 4th defendant was liable on the ground that the 4th defendant, as an engineer, should have taken more serious considerations of the ground and its vicinity in designing and devising plans that would make a house erected on Lot 3007 safe for habitation. In this the evidence of both Dr. Ramli and Dr. Toh complement each other in that the 4th defendant failed to do a thorough test of the soil and ground on Lot 3007. The 4th defendant only did visionary and feeling tests which the learned judge found not acceptable.

[29] The 4th defendant contended that the trial judge was in error when he accepted the evidence of Dr Ramli and rejected the evidence of Dr. Toh. After reading the judgment of the learned judge, we find that this is not true. The learned judge did consider the evidence of both but at the end preferred the evidence of Dr. Ramli on the ground that the investigation carried out by Dr. Ramli was closer to the time when the incident took place. Further, the evidence of Dr. Ramli was supported by the 4th defendant himself when he admitted that he did not do a thorough testing of the soil where the bungalow was built. This is negligence on the part of the 4th defendant. There is no fault on the part of the learned trial judge.

[30] The learned judge also found that the 3rd defendant was also partly to be blamed when he constructed a trench near the boundary of Lot 3007. The trench retained and collected water. The water collected saturated the ground mostly on Lot 3007. This was a contributory factor to the collapse. For that the learned judge found the 3rd defendant to be 40% liable. The 4th defendant was apportioned 60% liability on his failure to exercise his skill and duty as an engineer and consultant in constructing the bungalow.

[31] The 4th defendant's only other ground of appeal is found in para. 4 of the memorandum of appeal where it is stated that the learned judge had erred in giving judgment on "pure economic loss" based on tortious liability. In his judgment the learned judge stated as follows:

> This Court shall now move on to consider the plaintiffs' claim for negligence. Basically they allege that the 1st and/or 4th defendants have breached a duty of care in failing to take into serious consideration the stability of the slope on which the house was built. Against this, Mr. Ngeow, counsel for both these defendants

A immediately maintains that this claim is for pure economic loss, the collapsed house being the defective product. With this defence, this Court is forced to move into an arena of fierce legal embattlement now being raged throughout the entire Common Law practicing nations, and to take a legal stand.

B To understand this "loaded" term of pure economic loss or economic loss one has to move backwards in time, to the creation of the principles of negligence in the case of *Donoghue v. Stevenson* [1932] AC 562. There Lord Atkin expounded the principle of where there is a duty to exercise care, reasonable care C must be taken to avoid acts or omissions which can reasonably foreseen to be likely to cause physical injury to person or damage to his property other than the damaged property itself. By this proposition, a person without contractual relationship can claim from another damages for injury suffered by him or damage to his property, other than the defective product itself. Any claim to D this defective product either in the manner of making good or replacement thereto, is a claim for pure economic loss. This can be better explained in the context of the facts in *Donoghue v. Stevenson* itself. There the consumer of a bottle of ginger beer which contained the dead snail was successful in her claim against E the manufacturer of negligence for injuries to her health and damage to her property (if any) other than the contaminated bottle of ginger beer, it being the defective product.

This principle has been applied to different but analogous factual situation for a substantial period of time since first established, but F often the last condition of this proposition was not seriously considered in respect of defective houses until the case of *Dutton v. Bognor Regis Urban Council* [1972] 1 QB 373. In this case the plaintiff was the second purchaser of a house and soon after she moved in found serious defects in the internal structure of the building. Investigation revealed that this was caused by inadequate G foundation due to the fact that it was constructed on the site of a rubbish tip. She sued the local council whose building inspector was negligent in failing to detect the defect at an early stage of the building works. The only issue before the Court of Appeal in consequent to an award of damages to the plaintiff by the Court H of first instance for the estimated cost of repairs of the house and the surveyor fees was, whether the council was liable to the plaintiff for pure economic loss. Pure economic loss being the claim on the defective product ie, the defective house itself. The Court of Appeal dismissed the appeal and found in favour of the I plaintiff. By this, it means a departure from the principle that defective product itself cannot be claimed. This gives rise to a case of recovery of economic loss which was not consequent on any injury to person or damage to property.

Dutton's case was approved by the House of Lords in *Anns and Ors v. London Borough Council of Merton* [1978] AC 728. Here again the plaintiff who took a long lease in a block of flats found cracks in the wall. The cause was due to inadequate foundation. The builder was sued and so was the local council. The latter for allowing the builder to construct the building on inadequate foundation or in failing to carry out necessary inspection or approving the foundation. The House of Lords held that the council owed a Common Law duty of care to the plaintiffs. This again is a claim based on the defective product itself and thus pure economic loss can be recovered.

Though the above two authorities involve the liability of the local council, the House of Lords in *Junior Books Ltd v. Veither Co. Ltd* [1983] 1 AC 520 dealt directly with the builder's liability to the owner of the building with whom he had no contractual relationship with. They too were found liable for negligence on a claim for economic loss.

In 1989, this legal proposition in motherland of Common Law took a drastic change, and retreated from the broad view they took earlier. In the case of *D & F Estates Ltd & Ors v. Church Commissioners for England & Ors* [1989] AC 177, the House of Lords dismissed the Court of Appeal decision basically on the following grounds:

(1) any duty owed by a contractor to a home owner with respect of quality of the construction must arise in contract and not tort;

(2) that to allow the recoverability for the cost of repairing defects in the building would have the effect of creating a non-contractual warranty of fitness;

(3) the contractor can only be held liable in tort to subsequent purchaser on negligence which caused physical injury or damaged to other property other than the damaged property.

Once again the facts in this case are virtually similar to the cases referred to earlier. The defendants were main contractors hired by the owner to build a block of flats. A sub-contractor was engaged by the main contractor to carry out plastering work which they performed negligently. The plaintiff, a leasee to a flat in this block discovered that the plaster on the ceiling and wall were loose. He repaired it and sued the original contractor for the cost of repairs and estimated cost of future remedial works.

A The decision of *D & F Estates Ltd* was fortified by the latest case of *Murphy v. Brentwood District Council* [1990] 2 All ER 908, in which the House of Lords expressly departed from Anns. Here the defendant's council approved the design on the foundation of a house which was found by a subsequent purchaser to be
B defective. The highest court of appeal in the United Kingdom ruled that the defendant's counsel owed no duty of care to the plaintiff in respect of the damage of the kind sustained. The reasons, as Lord Keith put:

> To start with, if such a duty (of care) is incumbent on the
C local authority a similar duty must necessarily be incumbent also on the builder of the house. If the builder is so subject there can be no grounds in logic or in principle for not extending liability on like grounds to the manufacturer of the chattel. That would open on an exceedingly wide field of claims, involving the introduction or something in the nature
D of a transmissible warranty of quality. The purchaser of the article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect, and, presumably, if the article was not
E capable of economic repair, the amount of loss sustained through discarding it. Then it would be opened to question whether there should be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the
F destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the Anns principle is to be treated as confined to real property, where the building collapse when unoccupied.

G In another part of his judgment Lord Keith proceeded with:

> so far as policy consideration is concerned it is no doubt the case that extending the scope of the tort of negligence may tend to inhibit carelessness and improve standard of manufacturer and construction on the other hand, overkill
H may present its own disadvantages.

Unfortunately these sentiments do not seem to be shared by the Commonwealth counter-parts. Starting with New Zealand, the case of *Invercargill City Council v. Hamlin* [1996] 1 All ER 756 refused to follow Murphy. Ironically this is an appeal heard before
I the Privy Council which affirmed the decision of the New Zealand Court of Appeal for upholding the trial judge's finding that the City Council were liable for negligence to the plaintiff based on the following facts. The plaintiff contracted a builder who sold him

the land to construct a house thereon. In the course of construction a building inspector from the City Council inspected and approved the work as in accordance with the Council's by-laws. Years later cracks appeared in the house leading to this plaintiff's claim against the City Council. The reasons forwarded by the Privy Council for not adopting *D & F Estates Ltd & Murphy* appear to be:

(a) New Zealand Court of Appeal is entitled to develop the Common Law of New Zealand according to local policy consideration in areas of Common Law which are developing;

(b) And the perception in New Zealand is that the community standards and expectation demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance of by-laws, and the Court of Appeal of New Zealand has built up a long line of authority based on link concept of control by the local authority of building works through the enforcement of its by-laws, and reliance on that control by the purchaser.

Next comes Canada in *Winnipeg Condominium Corp No. 36 v. Bird Construction Co. Ltd & Ors* [1995] 121 DLR (4th edn.) 193. Here a developer entered into a contract with a general contractor called Bird Construction Ltd (Bird) to construct an apartment block. Works were carried out according to plans drawn by the architects – Smith Carter. As for the external cladding, it consisted of slabs of stones which were installed by a sub-contractor. The plaintiff becoming the subsequent owner of the apartment had to repair a section of the cladding which fell. He claimed from Bird, Smith Carter and the sub-contractor cost of repairs due to their negligence. Bird applied to strike the plaintiff's claim disclosing no reasonable cause of action. The Court of first instance disallowed this application which was upheld by the Canadian Supreme Court. La Forest J delivering the judgment of the Supreme Court is of the following views:

> The underlying rationale for this conclusion is that the person who participates in the construction of a large house and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonable standard of care.

He then continues:

> This is important because, in my view, the unfortunate result of the reasoning in *D & F Estates* is that it leaves its subsequent purchaser with no remedy against the contractor

A who construct the building with substandard materials and substandard workmanship and thereby puts subsequent purchasers at considerable risk.

In Australia, initially in the case of *Sutherland Shire Council v. Heyman & Anor* (1984-1985) 157 CLR 424 found that the
B Council was not guilty of negligence for approving plans which subsequently showed inadequate footings. However in their latest landmark decision in *Bryan v. Maloney* [1995] 128 ALR 163, the High Court of Australia by a majority supported the trial judge's ruling that the Council was liable for negligence to a subsequent
C owner of the property who was put to loss by the defective house. In their judgment, the High Court of Australia has this to say:

> The relationship between them (the subsequent purchaser and the builder) is marked by proximity in a number of
D important respects. The connecting link of the house is itself a substantial one. It is a permanent structure to be used indefinitely and, in this country, is likely to represent one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime. It is obviously foreseeable
E by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss, of the kind substantiated by Mrs. Maloney, to the owner of the house at the time when inadequacy of the footing first become manifest.

F

Closer home in Singapore, this similar type of issue appeared in the case of *RSD Architects Planners & Engineers v. Ocean Front Pte Ltd* [1996] 1 SLR 113. LP Thean, Judge of the Court of Appeal practically combed the entire Common Law countries for enlightenment as to whether the plaintiff, a management
G corporation of a condominium can sue the developers and the architects for pure economic loss arising out of faulty construction of the common property in the building. Ultimately, the Court of Appeal of Singapore elected not to follow *Murphy* and *D & F Estates* and found that the builders and architects can be liable for
H negligence.

At home two High Court decisions are made on this subject. The first is the case of *Kerajaan Malaysia v. Cheah Foong Chiew & Anor* [1993] 2 MLJ 439. Justice Wan Mohamed presided as follows:

I

> Kerugian yang dialami oleh plaintif adalah kerugian atau kehilangan ekonomi tulen (pure economic losses), dan defendan ketiga tidak boleh dikenakan tanggungan (liability) di bawah tort di atas kerugian yang dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tidak harta kepunyaan orang lain rosak akibat daripada perbuatan atau salahlaku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan (House of Lords) dalam kes *Murphy v. Brentwood DC* dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehingga bila-bila masa pun.

Justice Peh Swee Chin FCJ sitting as a High Court judge in a more recent case of *Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & 3 Ors* [1995] 2 AMR 1558 had the opportunity to confront this issue. He adopted the decisions in *Murph*y and *D & F Estates.* Though not directly stating the reason for his preference, this Court is of the view that it was founded in the fear of extending the scope of liability "for an indeterminate amount for an indeterminate time to an indeterminate class". It is rather unfortunate that we are deprived of Justice Peh's further elaboration and indepth reasonings for which he is highly acclaimed, particularly when "there are many cases which are not mentioned in the judgment and which allowed for recovery of pure economic loss in an action for tort", but he felt that "this is neither the place nor the time to discuss all of them".

In *Teh Khem On* the purchasers purchased a house from the vendor/builder. After taking possession they found cracks on the wall, the ground was uneven and the upstairs bathroom was leaking. This was repaired by the vendor/builder but subsequent defects appeared. This lead to a series of claims and counter-claims between the purchasers, the vendor/builder and the architects and engineers who were involved in the design and drawing of the said house. The architects and engineers contended that the purchasers' claim being for pure economic loss is not recoverable in negligence. To this Justice Peh agreed when he said:

> The decision of *D & F Estates* in the House of Lords, in so far as it concerns the non-recoverability of such pure economic loss as described above by an owner of the house against the builder in tort ie, by way of negligence: was confirmed twice by the House of Lords in *Murphy v. Brentwood District Council, supra* and Department of *Environment v. Thomas Bates & Sons Ltd* [1990] 1 All ER 943.

A In the light of the substantial persuasive authorities on this conflicting claims and without any determination from our appellate courts, this Court is impelled upon to decide whether to allow a claim for pure economic loss or to reject the same. For this, it is essential to unearth from the cited authorities the rational the courts expounded in arriving at their decisions.

B

For those against allowing the claim for pure economic loss, it is primarily to avoid the creation of liability "for an indeterminate amount for an indeterminate time to an indeterminate class", to quote Cardozo CJ in the American case of *Utramares v. Trouche* [1931] 255 NY 170, otherwise it would "open an exceedingly C wide field of claims" or creating "endless indeterminate liability" or "the overkill may present its own disadvantage." On the opposing camp in favour one has, "community's expectation and demand" of third parties to exercise due care and compliance with relevant by-laws, or the deprivation of relief would not justify the D economic loss suffered on the defective product, or the moral duty of third party to exercise care.

Of all the reasons against allowing pure economic loss, the fundamental rational is still to prevent the creation or extension of E liability to "an indeterminate amount for an indeterminate time to an indeterminate class." But these could be a misconception and unallied fear. Interpreting through the circumstances of all the cases cited, the amount of damages so claimed is not an indeterminate amount. They are the expenses and costs involved in repairing, making good or replacing the defective product, or F cost that may be involved in ensuring the defective product is of the condition that it should be in the first place. As for indeterminate time, it may be true that liability to a subsequent owner might be greater than the first owner but as the High Court in Australia in *Bryan v. Maloney (supra)* states, it can "limited by the element of reasonableness both in the requirement G that the damage be foreseeable and in the content of the duty of care." In respect of indeterminate class, this Court feels that it is best put in the High Court Justices *Bryan v. Maloney* as follows:

> H The similarities between the relationship between the builder and the first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significancy than the differences to which attention has been drawn, namely the absence of direct contact or dealing and the possibly extended time in which liability might arise. Both I relationships are characterised, to a comparable extent by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction

> can be drawn between the two relationship in so far as the foreseeability of a particular kind of economic loss is concerned: it is obviously foreseeable that loss will be sustained by whichever of the first or subsequent owners happens to be the owner at the time when the inadequacy of the footing becomes manifest.

With these arguments forwarded, one wonders why there is such limitation imposed upon a claim for pure economic loss, for after all the entire concept of negligence is to extend liability beyond the borders of privity. To impose such a restriction is highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated. There should be no fear that carelessness will be inhibited and the standard of manufacturing and construction section will be improved by the abolition of this so call limitation to a claim for pure economic loss, for after all, it is not this value that society from one generation to the next strive to achieve. To adhere to old principle and leaving it to Parliament to resolve the issue is by no means a solution, since the principle of negligence itself is founded on Common Law, and it is Common Law of the United Kingdom that has a change of heart. Possibly this could be a policy decision in that country as can be reflected in Lord Keith's judgment in Murphy when he said;

> Anns has the effect of imposing on the builders generally a liability going far beyond that which Parliament thought fit to impose on house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but adverted to in it.

In Malaysia we do not possess this piece of legislation. To adopt the decisions of *Murphy* and *D & F Estates* which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumbered upon the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is section 95 of the Street Drainage and Building Act which prohibits such authorities to be sued.

This legal principle for accepting a claim for economic loss is obviously not only confined to defective buildings and structures. It has far greater impact on all situations by analogy and if limited by the limitations imposed as in *Murphy* and *D & F Estates* it would be grossly inequitable with justice not being served. For these reasons it is the opinion of this Court that a claim for pure economic loss can be entertained in a claim in negligence.

A Now that this Court has found a claim for pure economic loss can be entertained, we shall return to the circumstances of our case. The legal principles to be applied in this claim of negligence against the 1st and/or 4th defendants must certainly be that of *Bolam v. Friern Hospital Management Committee (supra)* since this is a claim based on professional negligence. As this principle is similar to that as found under the cause of action for breach of contract which has been elaborated earlier, and since the facts are also identical there is no necessity for this Court to re-examine on them. Based on similar grounds as those stated earlier under the cause of action for breach of contract this Court hereby finds the 1st and/or 4th defendants liable to the plaintiffs for negligence.

[32] The learned trial judge chose to depart from the High Court decisions which were cited earlier. He was of the opinion that the decisions of *Murphy* and *D & F Estates* which were followed by the two High Court decisions were outdated in view of the decisions of the courts within the Commonwealth except England where the decisions of *Murphy* and *D & F Estates* are still binding.

[33] The learned counsel for the 4th defendant submitted that the learned judge was in error when he did not follow the decisions in *Kerajaan Malaysia v. Cheah Fong Chiew & Anor* [1993] 2 MLJ 439 and *Teh Khim On & Anor v. Yeoh & Wu Development Sdn Bhd & 3 Ors* [1995] 2 AMR 1558, the decisions of emminent judges of this country. It is obvious that the decisions in those cases followed the House of Lords' decision in *Murphy v. Brentwood District Council* [1990] 2 All ER 908. In the present appeal, the learned trial judge was fully aware of the decisions in the two Malaysian cases. This can be seen from his judgment where he had referred to the two cases. As can be seen the judgments were the judgments of two High Court Judges. The learned trial judge in the present appeal was also a High Court Judge (as he then was) and as such he was not bound by the decisions of those two cases. As such, we find no merit in the submission of the 4th defendant's counsel that the learned judge did not follow the other two decisions of the Malaysian High Courts.

[34] In our view, the learned judge was within his right to award damages on pure economic loss. We have been too long in the shadow of the House of Lords' decisions of *Murphy* and *D & F Estates*. We are of the view that it is time for us to move out of that shadow and move along with other Commonwealth countries where damages could be awarded on pure economic loss. In the

media we have seen how consumers suffer due to shoddy and haphazard manner the developers and contractors in putting up buildings with so many defects and in most cases, delay. The legislature and the government are fully aware of this and for those reasons a special tribunal has been set up to cater for complaints in respect of houses. As such the courts should also play their part in this.

[35] Anyway, in the present appeal, we are of the view that the losses by the plaintiffs were not pure economic losses. The evidence shows that the damages suffered by the plaintiffs were the loss of the bungalow which collapsed a few years after it was built on that site where the 1st defendant failed to conduct thorough tests on the site, whether it was safe to build a building as designed by the 1st defendant on that site. It was the duty of the 1st defendant as consultant employed by the plaintiffs to ensure that it was safe to build the building on that site. The evidence shows that the 1st defendant failed to carry a thorough test of the soil when they recommended the building to be built on the said land to the plaintiffs. For the said reasons, we are of the view that the learned judge came to the correct conclusion that the 1st defendant was also negligent and liable.

[36] For the above reasons, we find that there is no merit in the appeal and the appeal is hereby dismissed with costs. The order of the learned judge is hereby affirmed. The deposit is to be paid to the account of taxed costs.

[37] My learned brother, Abdul Kadir bin Sulaiman, JCA has seen this judgment in the draft and has expressed his agreement.